U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 January 2003

CASE NO.: 2001 - CLA - 0024

IN THE MATTER OF

UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

ED HUDSON, JANICE HUDSON, d/b/a CJ'S
COUNTRY MARKET & PIZZA PRO,
Respondent

APPEARANCES:

Jennine Lunceford,
Margaret Terry Cranford, Esq.
For the Complainant

John Bingham, Esq.
For the Respondent

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim brought by the United States Department of Labor (Plaintiff), pursuant to the Fair Labor Standards Act of 1938 (FLSA) as amended, at 29 U.S.C. 201 *et. seq*., and the regulations issued pursuant thereto at 29 C.F.R. § 579 - 580 (2002), against Ed and Janice Hudson, d/b/a CJ's Country Market and Pizza Pro (collectively the "Respondent"). The case was referred for a formal hearing before the Office of Administrative Law Judges, which was held on September 12, 2002, in Little Rock, Arkansas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Plaintiff submitted four exhibits, which were admitted, including: Wage and Hour Form 266 detailing the penalties assessed against Respondent; the medical records for Sharee Martin; a meat-slicing operator's manual; and an operator's manual for a dough mixer.[1] Respondent introduced eight exhibits, six of which are admitted, including: medical records for Sharee Martin; a letter to Daniel Bremer, the District Director for the Wage and Hour Division in Little Rock Arkansas; Respondent's income tax returns for the year 2000, 1997, and 1996; and regulations detailing the Arkansas Child Labor Laws.

I. ISSUES

The following issues were presented to the Court for adjudication on the date of the formal hearing:

1. Whether Respondent is an "enterprise" subject to the provisions of the child labor provisions of the FLSA.

2. Whether Plaintiff's suit against Respondent is barred by laches.

3. Whether Respondent violated the child labor provision of the FLSA when they employed four minors between the ages of sixteen and seventeen who regularly operated a power-driven meat slicer and a power driven dough mixer between May 1996 and September 1997.

4. Whether the occupations and work performed by the minors were hazardous as declared by the Secretary of Labor.

5. Whether Respondent violated the record keeping provisions fo the FLSA when they failed to keep information relating to their employees' dates of birth.

6. Whether the proposed penalty of $35,575.00 is in accordance with the child labor civil money penalty provisions of the FLSA, whether it should be lowered, and whether the alleged violation qualifies as a "*de minmis* exception."

Only Plaintiff submitted a post-hearing brief. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

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[1] References to the transcript and exhibits are as follows: Trial Transcript- Tr.__; Plaintiff's Exhibits- PX-__, p.__; Respondent' s Exhibits- RX-__, p.__.

I. FINDINGS OF FACT

A. Stipulations

At the commencement of the hearing the parties stipulated and I find:

1. Ed Hudson and Janice Hudson own and operate CJ's Country Market and Pizza Pro located at 7404 Batesville Pike, Jacksonville, Arkansas 72076.

2. Ed Hudson and Janice Hudson actively manage the day-to-day operations of CJ's Country Market and Pizza Pro which tasks include but are not limited to hiring and firing employees, and supervising and directing employees' work.

3. From June 1, 1997, through September 21, 1997, Ed Hudson and Janice Hudson d/b/a CJ's Country Market and Pizza Pro employed Sharee Martin, a minor born on April 12, 1981.

4. From May 1, 1996, through September 22, 1997, Ed Hudson and Janice Hudson d/b/a CJ's Country Market and Pizza Pro employed Amanda Mudge, a minor born on November 28, 1979.

5. From February 6, 1996, through September 22, 1997, Ed Hudson and Janice Hudson d/b/a CJ's Country Market and Pizza Pro employed Bryan Brown, a minor born on February 6, 1981.

6. From August 20, 1997, through September 22, 1997, Ed Hudson and Janice Hudson d/b/a CJ's Country Market and Pizza Pro employed Shonia Lingenfelter, a minor born on November 9, 1979.

B. Overview

In 1994, Mr. and Ms. Husdon, purchased CJ's Country Market and commenced operating a retail grocery store, followed by a licensed franchise Pizza Pro and Pro Sub shop under the same roof in the same location. (Tr. 138-40). Mr. Hudson testified that when he took possession of the business he noticed a poster issued by the State of Arkansas detailing the child labor statutes and regulations. (Tr. 142). In good faith, Respondent believed that they could employ minors above the age of sixteen in hazardous occupations as defined by the State of Arkansas. (Tr. 143). Thereafter, Respondent hired four minor workers, between the ages of sixteen and eighteen, and part of their duties included operating a dough mixer in the Pizza Pro Shop and operating a meat slicer in the Pro Sub section of the store. (Tr. 141). Use of both the dough mixer and the meat slicer violated the

Secretary's Hazardous Occupation Orders for the United States Department of Labor. *See* 29 C.F.R. 570.61 & 570.62 (2002).

On August 12, 1997, Sharee Martin, a minor, cut her finger while using the meat slicer. (PX 2, p. 1). Respondent took Ms. Martin to a hospital where she received eight stitches, and her wound did not fully heal until October 27, 1997. *Id*. at 7. Although Ms. Martin did not lose any time from work, she missed the opportunity to play basketball her junior year of high school. (Tr. 62). Three weeks after her accident, Respondent instructed her to return to her duties on the meat slicer. (Tr. 146). Ms. Martin refused, and after Ms. Martin's father spoke with Respondent, Ms. Martin terminated her employment. (Tr. 147-48). Shortly thereafter, Respondent was investigated by the United States Department of Labor, Wage and Hour Division, for violation of the child labor laws. In total, Respondent received nine violations, four for each minor who used the dough mixer, four for each minor who used the meat slicer, and one for failing to keep proper records of minor employment. (PX 1). Because, the Administrator initially determined that Ms. Martin's injury was serious, he assessed a heavier fine and bundled the violations of other minor employees engaged in the same activity in arriving at a total fine of $35,175.00. Respondent filed a timely appeal.

C. Hearing Testimony

(1) Testimony of Sharee Martin

Ms. Martin, born on April 20, 1981, testified that shortly after her sixteenth birthday she began to work for Respondent. (Tr. 43-44). That business had a gas station, a grocery store, a deli, a Pizza Pro and it sold groceries. (Tr. 44). Ms. Martin worked primarily in the Pizza Pro part of the business but she also worked in the deli and operated the cash register. (Tr. 44-45). As a cashier, Mr. Martin accepted both credit cards and food stamps. (Tr. 45-56).

While working in the Pizza Pro part of the business Ms. Martin testified that she made pizza dough two to three times per week by mixing flour, water, and oil into the dough mixer. (Tr. 47-49). Amanda Mugee, a seventeen year old employee trained her on how to use the dough mixer, and Ms. Martin testified that she trained Shonia Lingenfelter, a seventeen year old minor, on how to operate the dough mixer. (Tr. 48, 50). On reporting to work, Respondent would inform her of what job she was to perform that day. (Tr. 48).

Ms. Martin also testified that she worked in the deli, which had lunch meats and cheeses which were cut on a meat slicer. (Tr. 51). Customers would order those items by the pound, and Ms. Martin would slice the meat or cheese to the desired thickness. (Tr. 52). After Respondent started a Pro Sub shop, Mr. Martin also used the meat slicer to slice lettuce. (Tr. 52-53). Ms. Martin testified that she never saw a metal mesh glove for use with the meat slicer, and she did not notice any change in operations after she suffered her injury. (Tr. 66).

On August 12, 1997, Ms. Martin testified that she was the only person working in the deli when a customer ordered sliced cheese. (Tr. 54-55). The block of cheese was long, and the safety guard, or handle guide, would not fit. (Tr. 56). Holding onto the cheese with her hands, Ms. Martin inadvertently cut her finger. (Tr. 56). Ms. Martin noticed "a lot of blood," reported the injury and did not think it was a "big deal" at first. (Tr. 56). Another minor employee, Bryan, cleaned off the meat slicer, noticed a piece of Mr. Martin's finger still on the table, and he provided it to Ms. Hudson when she took Ms. Martin to the hospital. (Tr. 57). Rather than allowing Ms. Martin to call her mother to find out who her physician was, Respondent took Ms. Martin to their doctor. (Tr. 57-58). When Ms. Martin reached the clinic emergency room, she was in pain, she went to sleep, and when she awoke, she had stitches in her finger. (Tr. 58). Neither the clinic nor Respondent obtained prior parental consent. (Tr. 59-60).

The physician told Ms. Martin that she could go back to work, but she was instructed to return to the hospital every day so that her wound could be cleaned and bandages changed. (Tr. 60). Ms. Martin testified that she returned to work on her next scheduled day following the accident. (Tr. 63). Ms. Hudson took her to and from the hospital for her periodic visits. (Tr. 73). Two or three weeks after her accident Respondent instructed Ms. Martin to return to her post in the deli and to use the meat slicer. (Tr. 63). Ms. Martin responded that she did not want to, and Respondent told her to stop being a "baby." (Tr. 64). After telling her situation to her parents, Ms. Martin's father spoke with Respondent. (Tr. 64). Respondent allegedly said that if Ms. Martin did not use the meat slicer then she did not have a job, and Ms. Martin never worked for Respondent again. (Tr. 64-65). A month after the injury, the doctor removed Ms. Martin's stitches. (Tr. 61-62). Ms. Martin testified that she still has no feeling in the tip of her finger, but had no loss of mobility, and after three months Ms. Martin related that her finger was useable again. (Tr. 67, 185-86).

After leaving CJ's Country Market, Ms. Martin went to work for another Pizza Pro shop that also made subways and had a dough machine, but she testified that she did not use the dough mixer or slice meat. (Tr. 68). Ms. Martin acknowledged that the safety features of Respondent's dough mixer prevented an employee from placing his or her hand in danger because once the safety ring was removed, the machine automatically cut off. (Tr. 71).

(2) Testimony of Amanda Mudge

Ms. Mudge, born on November 28, 1979, testified that from the spring of 1996, to the fall of 1997, she worked for Respondents at CJ's Country Market. (Tr. 76). Ms. Mudge sometimes worked as a cashier where she accepted payment for cigarettes, accepted food stamps and executed credit card transactions. (Tr. 77). Ms. Mudge also testified that she worked in the Pizza Pro shop where she used the dough mixer. (Tr. 78). About twenty-five percent of her time she spent working in the deli where she used the meat slicer. (Tr. 78-79). Although Ms. Mudge was not present when Ms. Martin cut her finger, Ms. Mudge testified that after Ms. Martin's accident, minors continued to use the meat slicer and dough mixer. (Tr. 81-82). Ms. Mudge turned eighteen right after Ms. Martin's accident, and she could not remember whether Respondent prohibited anyone under eighteen from using the meat slicer or if Respondent got rid of the machine. (Tr. 84-85). Whenever

customers ordered a pizza, they paid for it at a central cash register that also serviced the grocery store. (Tr. 83). Ms. Mudge also testified that the dough mixer would not work if an employee removed the safety ring and there was no way an employee could get his or her hands caught in the mixer while it was running. (Tr. 85).

(3) Testimony of Bryan Brown

Mr. Brown testified that he worked three to four years at CJ's Country Market and he was present when Ms. Martin cut her finger. (Tr. 181). Mr. Brown testified that after Ms. Martin cut her finger and Mr. Hudson learned that minors could not operate the meat slicer, Mr. Hudson took the meat slicer out of the store. (Tr. 181). Use of the dough mixer also changed because no one under eighteen was allowed to operate the machine. (Tr. 181-82). Prior to that time, however, Mr. Brown testified that as a sixteen year old minor he used both the meat slicer and the dough mixer. (Tr. 182). While he used the meat slicer nearly every day, he only used the dough mixer about once per week. (Tr. 183).

(4) Testimony of Shonia Lingerfelter

Ms. Lingerfelter testified that she worked in both the Pizza Pro and deli sections of CJ's Country Market where she used the dough mixer and meat slicer. (Tr. 200-01). After Ms. Martin's injury, Ms. Lingerfelter testified that Ms. Hudson provided a metal mesh glove to use when slicing meat. (Tr. 201-02).

(5) Testimony of Ed Hudson

Mr. Hudson testified that he bought CJ's Country Market with his wife in1994 without having any training in managing a business. (Tr. 138). CJ's Country Market was periodically inspected by the State of Arkansas without experiencing any trouble. (Tr. 138-39). The Pizza Pro part of the business was a franchise for which the State of Arkansas required a separate license to operate and the Hudsons opened that part of the business about a month after opening the country market. (Tr. 139). About a year and a half later, just prior to Ms. Martin's employment, The Hudsons opened the sub-sandwich shop using their own meats. (Tr. 140). Everybody that worked at the store used the meat slicer. (Tr. 141).

When the Hudsons bought the store, Mr. Hudson noticed a poster on the office door detailing the Arkansas labor laws, and the former proprietor informed Mr. Hudson that minors had to be at least sixteen years old before operating the meat slicer. (Tr. 142). When Mr. Hudson contemplated employing a minor under the age of sixteen, he obtained a booklet on the Arkansas child labor laws to make sure that he was in compliance with State statutes and regulations. (Tr. 143). Mr. Hudson had no actual knowledge of the federal child labor statutes or regulations. (Tr. 143). The Hudsons hired Ms. Martin because Mr. Hudson knew her family and they wanted to help with summer employment so that she could purchase an automobile. (Tr. 145).

When Ms. Martin cut her finger, Mr. Hudson testified that he had his spouse take her to the only doctor that he knew at the Jacksonville Clinic. (Tr. 144). When Ms. Martin returned from the doctor, her shift was almost over, so Ms. Martin went home. (Tr. 145). Claimant came back to work without missing any time and Mr. Hudson told her to avoid any work that hurt her finger. (Tr. 146). Mr. Hudson also opined that Ms. Martin was a "big baby" who makes everything out "ten times worse than it really is." (Tr. 146). After three weeks, Mr. Hudson received a note from Ms. Martin's doctor that her finger had healed and she could return to work. (Tr. 146). When Mr. Hudson told her to go back to work in the Pizza Pro, Ms. Martin was not happy because, as Mr. Hudson opined, she did not like to work. (Tr. 146).

The following day, Ms. Martin's father, Bud Martin, informed Mr. Hudson that his daughter was not going to operate the meat slicer any more. (Tr. 147). Mr. Hudson stated the he was not going to give Ms. Martin any more special treatment, including driving her to and from work, and Mr. Martin took his daughter home. (Tr. 148). A week later, Mr. Birkhead with the United States Department of Labor appeared to investigate Ms. Martin's employment. (Tr. 148).

After finding out that minors could not operate the meat slicer under federal law, Mr. Hudson got rid of his meat slicer, fired "almost everybody," and hired only persons over the age of eighteen. (Tr. 150-51). Mr. Hudson also spoke with the head of the Wage and Hour Division, received a fine to which he filed an objection, and thought the ordeal was over until three and one-half years later when this litigation resumed. (Tr. 152-53). Ms. Hudson also stopped anyone under the age of eighteen from using the dough mixer. (Tr. 153). His particular mixer was "a good one," recommended by Pizza Pro, and it was "impossible" to get hurt using the machine. (Tr. 153). Mr. Hudson testified that his business used the dough mixer twice a week to make four to six batches of dough at a time - a process that took about seventy five minutes. (Tr. 156).

When using the meat slicer to cut cheese, Mr. Hudson testified that he instructed his employees to cut the block of cheese in half, so that it would fit on the meat slicer and the employees could effectively use the metal guide. (Tr. 154). Additionally, Mr. Hudson had a mesh metal glove to use when slicing, but his employees did not like to use it because it was too much trouble to put on. (Tr. 155).

Upset that the United States Department had fined his business, Mr. Hudson called OSHA to investigate his business. (Tr. 158). The investigator came, noticed a few minor violations, all of which Mr. Hudson fixed. (Tr. 159).

Mr. Hudson stated that in 1997 his Pizza Pro business grossed between fifty and eighty thousand dollars per year. (Tr. 156). Total gross sales approximated $750,000.00, but most of that was for gasoline, for which his profit margin was 1.4 cents per gallon for regular unleaded. (Tr. 157). Mr. Hudson testified that he worked seventy to eight hours a week in his store, and that he employed anywhere from three to seven additional employees. (Tr. 160). Unsure of his profit margin, Mr. Hudson testified that he was "surviving." (Tr. 160-61). If faced with the prospect of paying the fine imposed by the United States Department of Labor, Mr. Hudson testified that he would not be able

to pay it because his business does not have that kind of cash. (Tr. 161-62). Finally, Mr. Hudson testified that his spouse kept records on all the minors employed, and would have provided such information if asked by the investigator. (Tr. 206).

(6) Testimony of Barlow Frank Curran

Mr. Curran, a district director of the Wage and Hour Division for the United States Department of Labor in the States of Arkansas and Oklahoma, testified that he oversees the assessment of civil money penalties for violations of the federal child labor laws. (Tr. 88-89). In determining the amount of a civil money penalty, Mr. Curran testified that he was directed by several regulatory considerations including the number of previous violations, the availability of documentation, the employer's knowledge of the law, the frequency and the magnitude of the conduct. (Tr. 89). Other factors Mr. Curran considers is the size of the business, the number of employees, the volume of business, and the consequences of the violation. (Tr. 90). Even in cases where there was no death or serious injury, he recommended a civil money penalty if the employer violated a Hazardous Occupation Order. (Tr. 92-93). At the time Mr. Curran prepared Respondent's civil money penalty, he believed that a serious injury had occurred, the file indicated that the minor had missed a period of four weeks of work, had continuing disability in the form of numbness with less than a full range of motion that restricted her ability to write, a violation of a Hazardous Occupation Order had occurred, and that more than one minor had been employed in violation of the law. (Tr. 94).

After hearing testimony in Court, Mr. Curran stated that he still considered Ms. Martin's injury as serious. (Tr. 100). Ms. Curran testified that the $8,500.00 penalty he assessed for a serious injury was in accordance with Wage in Hour guidelines, and was less than the $10,000.00 maximum allowed by statute for fatalities. (Tr. 102). Unsure tif the amounts listed on his civil money penalty form were "appropriate," in a settlement context, Mr. Curran stated that he may decrease the penalty. (Tr. 102).

In assessing an $18,000 civil money penalty for the other three minors who were not seriously injured, but who also used the meat slicer, Mr. Curran stated that the dollar amount was determined by multiplying by a factor of five the $1,200.00 assessed for illegally employing children in violation of a Hazardous Occupation Order. (Tr. 102-03). Additionally, the $26,500.00 penalty assessed ($8,500.00 for Ms. Martin who was seriously injured on the meat slicer, and $6,000 for each of the three other minor employees who were not injured but also employed using the meat slicer), was separate from the $4,800.00 penalty imposed for allowing four minors to use the dough mixer, which he considered a lesser offense. (Tr. 103). Had there been no serious injury to Ms. Martin, then the penalties for operation of the meat slicer would have been reduced to reflect the approximate penalties issued for operation of the dough mixer. (Tr. 126). Mr. Curran believed a serious injury had occurred whenever an employee missed four days of work or if there was a continuing or permanent disability. (Tr. 130-31).

Mr. Curran did not reduce the amount of the civil money penalty based on the size of Respondent's business because he determined that a serious injury had occurred and Respondent had

violated a Hazardous Occupation Order, thus Respondent was not entitled to a reduction under the rules of his civil money penalty form. (Tr. 105). The fact that Respondent's dough mixer had a safety ring making it extremely safe to operate did not change Mr. Curran's mind about a violation of the child labor laws because any use of the dough machine was prohibited by the Hazardous Occupation Order. (Tr. 112). After reviewing a safety videotape of Respondent's mixer, Mr. Curran still opined that use of the dough mixer was a violation of the Hazardous Occupation Order issued by the Department of Labor. (Tr. 187). Mr. Curran would not alter his civil money penalty based on mitigating factors because the $1,200.00 he assessed for the violation was far below the $10,000 authorized by statute. (Tr. 189). The fine would be the same whether Respondent used an open dough mixer or a closed dough mixer. (Tr. 191). Likewise the availability of a metal mesh glove for slicing meat was not a mitigating factor for Mr. Curran, but under different circumstances, if an injury had been avoided by the use of the glove, then the glove may be a mitigating factor. (Tr. 190). After hearing testimony on the severity of Ms. Martin's injury, however, Mr. Curran testified that his penalty for use of the dough mixer would remained unchanged, but he doubted if he would still consider the use of the meat slicer a serious injury. (Tr. 195).

Mr. Curran operated under the belief that Respondent was subject to the FLSA because Respondent employed persons engaged in interstate commerce and Respondent's enterprise was engaged in interstate commerce with an annual dollar value in excess of $500,000.00. (Tr. 107-08).

C. Exhibits

(1) August 12, 1997, Accident Report

On August 12, 1997, MedWorks at the Rebsamen Regional Medical Center in Jacksonville, Arkansas, completed an accident report on Sharee Martin in relation to her meat slicer injury. (PX 2, p. 1). Ms. Martin's treating physician diagnosed an one to two centimeter amputation at the index finger and nail head that needed re-attachment. *Id*. Her injury required eight stitches. *Id*. at 1-2. In follow-up appointments, Ms. Martin's wound healed well, and on August 28, 1997, Ms. Martin's stitches were removed. *Id*. at 4. By September 22, 1997, Ms. Martin's finger looked cosmetically better, there was no deformity, and it had healed well, but she complained that she could not apply pressure on her fingertip. *Id*. at 5. On October 27, 1997, Ms. Martin only had a mild sensory loss and she was discharged from treatment. *Id*. at 7.

(2) Respondent's Tax Returns

For the calendar year 1996, Respondent had total and adjusted gross income of $13,340.00. (RX 4, p. 1). Respondent claimed a business loss of $2,803.00. *Id*. Gross business receipts totaled $891,559.00, and gross business income totaled $208,229.00. *Id*. at 4. Respondent claimed business expenses, however, in the amount of $211,032.00, which resulted in the business loss. *Id*. at 4-5.

For the calendar year 1997, Respondent claimed a business loss of $30,581.00, resulting in an adjusted gross loss of income totaling $12,273.00. (RX 5, p. 1). Gross receipts for 1997 totaled $805,510.00, and the business had a gross income of $143,721.00. *Id*. at 5. Business expenses, however, totaled $174,302, resulting in a net business loss. *Id*.

For the calendar year 2000, Respondent claimed a business loss of $16,578.00, resulting in negative adjusted gross income of $21,912.00. (RX 3, p. 1). Gross receipts totaled $1,020,047.00, and the business had a gross profit of $120,992.00 *Id*. at 5. Business expenses totaled $137,570.00, resulting in a net business loss. *Id*.

II. CONCLUSIONS OF LAW

A. Contention of the Parties

Plaintiff asserts that Respondent violated the FLSA by employing four minor children and having them operate a meat slicer and dough mixer in violation of Hazardous Orders Numbers 10 and 11. Plaintiff also alleges that Respondent failed to produce any mitigating factors and Respondents should pay the full amount of the imposed fine. The fact that the violations of the FLSA were proved at the formal hearing left only the issue of whether the Wage and Hour Division had properly assesses a civil money penalty against Respondent. Plaintiff argues that Respondent made no effort to comply with the child labor provisions of the Act, and Ms. Martin sustained a "serious" injury as contemplated by the FLSA. Finally, Plaintiff argues that based on the facts of this case the civil money penalty assessed for violations of the FLSA cannot be reduced.

Respondent contends that the grocery store/gas station part of the business has gross receipts in excess of $500,000.00 and constitutes an enterprise, but the Pizza Pro shop, maintained at the same location with a different set of books, has gross receipts under $80,000.00 and is not subject to the FLSA. Respondent further contends that employing children over the age of sixteen to operate circular or band saws is legal under the law of Arkansas, and argues that the dough mixer used in the business has safety features preventing it from being classified as hazardous occupation unfit for children. Respondent also argues that the injury to Sharee Martin was not serious, and alleges that she did not miss any time from work. Once Respondent learned that employees under the age of eighteen could not use the meat slicer, Respondent immediately ceased all such activity. Respondent alleges that any action by the Department of Labor should be bared by laches considering the fact that five years have passed since Respondent first asked for a formal hearing. Finally, Respondent argued that the amount of the fine, should any be imposed, is excessive and should be reduced pursuant to Respondent's financial condition, mitigating factors, and in accordance with the purposes of the FLSA.

B. Jurisdiction of the FLSA

The FLSA provides that "[n]o employer shall employ any oppressive child labor in commerce . . . or in any enterprise engaged in commerce." 29 U.S.C. § 212(c) (2002). The child labor provisions of the FLSA were issued by Congress pursuant its constitutional power to regulate interstate commerce. U.S. Const. Art. I § 8, cl. 3; 29 U.S.C. § 202 (2002); *Overnight Motor Transp. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942). The scope of the chapter is not, however, co-extensive with the maximum limits that Congress may exercise over commerce. *Mitchell v. Wade Lahar Const. Co.*, 179 F. Supp. 551 (D. C. Ark. 1960), *aff'd* 290 F.2d 408 (8th Cir.1961): *Billeaudeau v. Temple Associates*, 213 F.2d 707 (5th Cir. 1954). Rather, Section 212 of the FLSA regulates, in part, "commerce" and "any enterprise engaged in commerce."[2] 29 U.S.C. § 212(c) (2002). "Commerce" is defined as any "trade, commerce, transportation, transmission, or communication among the several states . . ." 29 U.S.C. § 203(b) (2002). An "enterprise" includes "the related activities performed (either through a unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments. . . ." 29 U.S.C. § 203(r)(1) (2002). An "enterprise engaged in commerce" means an enterprise that "has employees engaged in commerce" and is "an enterprise whose gross annual volume of sales is not less that $500,000.00. . . ." 29 U.S.C. § 203(s)(1).

Here, Ms. Martin testified that she sometimes worked for Respondent as a cashier and that she regularly accepted food stamps and credit cards. (Tr. 45-46). Respondent's tax returns show that for the calendar years 1996, 1997, and 2000, the gross annual volume of sales far exceeded $500,000.00. (RX 3-5). While Respondent's Pizza Pro business required a separate licence to operate, it, like the deli, was housed in the same building, was serviced by a central cash register, was owned by Respondent, and treated as a single entity on Respondent's tax returns. (Tr. 83, 110; RX 3-5). Goods arrived at the store by truck. (Tr. 45). Accordingly, Respondent is covered by the child labor provisions of the FLSA because it operates an enterprise whose gross sales exceeds $500,000.00, it conducts interstate transactions by accepting food stamps and credit cards, and receives goods from interstate commerce.

C. Laches

Respondent asserts that Plaintiff's action should be barred by laches because Respondent asked for a hearing five years ago, and because of the delay proceeding the formal hearing, Respondent was unable to locate a poster which he relied upon in hiring minors in his business. (Tr. 37). Laches is an equitable doctrine, acting as a limitation on a parties right to bring suit, and serves

[2] Under 29 C.F.R. § 570.113(b) (2002) the Secretary construes coverage of the child labor provision in a manner consistent with coverage under the wage and hour provisions found at 29 C.F.R. § 776 & 779.

as a counterpart to a statute of limitations which generally applies to actions at law.[3] *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925 (7th Cir. 1984). The doctrine of laches will bar a claim when three elements are present: 1) there is a delay in asserting a right or a claim; 2) that the delay was not excusable; and 3) that there was undue prejudice against whom the claim is asserted. *Strawn v. Missouri State Board of Education*, 210 F.3d 954, n.3 (8th Cir. 2000); *Venus Lines Agency, Inc. v. CVG International America, Inc.*, 234 F.3d 1225, 1230 (11th Cir. 2000).

In this case, none of the necessary elements of laches are present. First, Mr. Birkheart, with the United States Department of Labor appeared at Respondent's place of business a week after Ms. Martin's employment ended to investigate possible violations of the FLSA. (Tr. 148). Mr. Hudson testified that he received a fine, and filed an objection through an attorney in November 1997, and he thought the matter was over. (Tr. 152-53). For reasons not clear in the record, the case was assigned to the Office of Administrative Law Judges for a formal hearing on February 13, 2001. Despite the long delay between Respondent's objection and the formal hearing, Respondent was on notice that the Department of Labor was asserting its authority to impose a civil money penalty for violations of the FLSA soon after the workplace injury to Sharee Martin. Laches applies to delays in time for commencing a suit, not for delays in litigation. *See Boone v. Mech. Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979) (stating that laches applies to the parties right to bring suit). Here, the Department of Labor exercised it right to bring suit against Respondent in November 1997, in response to FLSA violations that occurred in September 1997, which is not undue delay under the circumstances.

Likewise, failing to show an unreasonable delay in bringing an action, Respondent fails for the same reasons to demonstrate that the delay was inexcusable. Finally, Respondent failed to show any undue prejudice for failing to bring the claim (or have the formal hearing) earlier. Respondent alleged that the passage of time prohibited him from producing a poster that he relied on detailing child labor laws for the State of Arkansas. (Tr. 37). Respondent established at the formal hearing that he acted in accordance with what he believed was required by the Arkansas State laws, Respondent provided the Court with an exhibit of the Arkansas Child Labor Laws and Administrative Regulations, and I am free to take judicial notice of the state statutes and regulations. Thus, Respondent showed no undue prejudice.

D. Establishing a Prima Facie Case in Violation of the FLSA's Child Labor Prohibitions

The FLSA provides that "[n]o employer shall employ any oppressive child labor in commerce . . . or in any enterprise engaged in commerce." 29 U.S.C. § 212(c) (2002). "Oppressive Child

[3] Section 216(e) of the FLSA does not contain an independent statute of limitations for bringing an action in violations of the child labor laws. 29 U.S.C. § 216(e) (2002). Likewise there is no independent regulation of limitation provided by the Secretary's rules. 29 C.F.R. § 570 & 580 (2002). Under 28 U.S.C. § 2462 (2002), however, "an action, suit or proceeding for the enforcement of a civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ."

Labor" is defined by the FLSA in pertinent part as a condition of employment under which "any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous. . . ." 29 U.S.C. § 203(l) (2002). In following this statutory directive, the Secretary of Labor wrote regulations that detail specific occupations deemed particularly hazardous for the employment of minors between the ages of sixteen and eighteen. Pertinent to this case are Hazardous Occupation Orders Numbers 10 and 11:

> **Occupations in the operation of power driven meat processing machines . . . .**
>
> (4) All occupations involved in the operation or feeding of the following power-driven machines, including setting-up, adjusting, repairing, oiling, or cleaning such machines, regardless of the product being processed by these machines (including, for example, the slicing in a retail delicatessen of meat, poultry, seafood, bread vegetables, or cheese etc.) . . . .

29 C.F.R. § 570.61(a)(4) (2002).

> **Occupations involved in the operation of bakery machines . . . .**
>
> (1) The occupations of operating, assisting to operate, or setting up, adjusting, repairing, oiling, or cleaning any horizontal or vertical dough mixer . . . .

29 C.F.R. § 570.62(a)(1) (2002).

In this case, Respondents admitted to hiring Sharee Martin, Amanda Mudge, Shonia Lingerfelter and Bryan Brown, all between the ages of sixteen and eighteen at the time the Department of Labor investigated the alleged violations of the child labor laws in the summer of 1997. Sharee Martin testified that she was born on April 20, 1981, and operated the dough mixer and meat slicer as part of her employee duties. (Tr. 47-49, 51). Amanda Mudge, Born November 29, 1979, testified that from 1996 to 1997 she work for Respondents and operated both the dough mixer and mat slicer as part of her employment. (Tr. 78-79). Shonia Lingerfelter, born on November 9, 1979, testified that she worked for Respondent from August to September 1997, during which time she operated both the dough mixer and meat slcier. (Tr. 200-01). Bryan Brown, born February 6, 1981, worked for Respondent from 1996 to 1997, and he testified that he used both the dough mixer and the meat slicer. (Tr. 182). Respondent did not dispute these facts. Accordingly, I find that Respondent violated 29 U.S.C. § 212(c) of the FLSA, and the implementing regulations at 29 C.F.R. § 570.61-62, by employing minors between the ages of sixteen and eighteen in hazardous occupations as defined by the Secretary of Labor.

E. Assessment of a Civil Money Penalty

Any employer that violates Section 212 of the Child Labor provisions "shall be subject to a civil money penalty of not to exceed $10,000.00 for each employee who was the subject of such violation." 29 U.S.C. § 216(e) (2002); 29 C.F.R. § 579.5 (2002). In determining the appropriateness of any penalty, the statute mandates consideration of the "size of the business of the person charged and the gravity of the violation." *Id*. An ALJ's review of the Administrator's penalty assessment is *de novo*. 29 C.F.R. § 580.12(b) & (c) (2002); *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996). In determining the appropriateness of a civil money penalty the Secretary of Labor directs:

> (b) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the size of the business of the person charged with the violation or violations, taking into account the number of employees employed by that person . . ., dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person.
>
> (c) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours.
>
> (d) Based on all the evidence available, including the investigation history of the person so charged and the degree of willfulness involved in the violation, it shall further be determined, where appropriate, (1) Whether the evidence shows that the violation is "de minimis" and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act; or (2) Whether the evidence shows that the person so charged had no previous history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act.

29 C.F.R. § 579.5 (b-d) (2002).

Once a civil money penalty is challenged by a respondent, the issue is not whether the Administrator's computation of Wage and Hour Form 266, (WH- 266), used to assess the penalty, was correct, rather the ALJ must determine if the assessed penalties correspond to the statutory and regulatory provisions. *Administrator, Wage and Hour Division v. Elderkin Farm*, ARB Case Nos. 99-033, 99-048, 1995 CLA 31 (ARB June 30, 2000). Although the grid and matrix scheduled incorporated into WH-266 is an appropriate tool to recommend penalties by a field officer, and the Administrator's interpretation of a regulatory guideline is entitled to deference, that does not affect the the ALJ's scope of authority to change the Administrator's assessment. *Administrator, Wage & Hour Division, v. Thirsty's, Inc.*, 94 CLA 65 (ARB May 14, 1997) (stating that the ALJ's scope of authority to change the Administrator's assessments is "untrammeled"); 29 C.F.R. § 580.12(b) (2002) (stating that the ALJ shall determine the appropriateness of the penalty assessed by the Administrator). Accordingly, I will consider each of the statutory and regulator factors *de novo* in reviewing the Administrator's civil money penalty for Respondent's uncontested violations of the child labor provisions of the FLSA.

(1) Size of the Business

Under 29 C.F.R. § 579.5(b) (2002), the regulations mandate consideration of "the size of the business of the person charged with the violation or violations, taking into account the number of employees employed by that person . . ., dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person." In this case, Mr. Hudson testified that he and his spouse operated the business as an unregistered partnership and employed between three and seven additional employees. (Tr.160). Additionally I note that for both Mr. and Ms. Hudson and for all the additional employees, Respondent's wage expenses (less any employment credits) totaled only $62,901.00 in 1996, $69,428.00 in 1997, and $44,975.00 in 2000. (RX 3, p. 5; RX 4, p. 4; RX 5, p. 5) Respondent declared a net business loss of $2,803.00 in 1996, $30,581.00 in 1997, and $16,578.00 in 2000. (RX 3-5). Mr. Hudson testified that the business was "surviving." (Tr. 160-61). Accordingly I find that the small "mom and pop" nature of the business, the limited number of employees, the limited amount of wages paid to the employees, and the net operating losses mitigate in favor of a lesser civil money penalty.

(2) Gravity of the Violation

In considering the gravity of the violations, the regulations direct that the ALJ take into consideration such things as prior history; willful failure to take reasonable precautions; the number, age, and occupation of minors illegally employed; records of the required proof of age; exposure of the minors to hazards; any resultant injury; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours. 29 C.F.R. § 579.5(c) (2002).

(2)(a) Prior History

Respondent purchased CJ's Country Market in 1994 without having any business background. (Tr. 138). Respondent has no prior history of violations of either the federal of State of Arkansas child labor laws.

(2)(b) Wilful Failure to Take Reasonable Precautions

Respondent and the illegally employed minors testified that the dough mixer was safe to operate and the safety rings on the mixer prevented any dangerous use. (Tr. 71, 85, 153). Although Ms. Martin testified that she never saw a metal mesh glove for use when operating the meat slicer, (Tr. 66), Mr. Hudson did provide that additional precaution after Ms. Martin's injury. (Tr. 155, 201-02). Furthermore, after Respondent learned that it was illegal for persons between the ages of sixteen and eighteen to use a dough mixer and meat slicer, Respondent removed the meat slicer from his premises, prohibited anyone under the age of eighteen to use the dough mixer, and he fired "almost everybody." (Tr. 150-51, 181-82). Accordingly, I find that Respondent did not wilfully fail to take reasonable precautions in attempts to avoid injuries to minors in his employ.

2(c) Number, Age, and Occupation of Minors Illegally Employed

Respondent employed four minor children, between the ages of sixteen and eighteen in violation of Hazardous Occupation Orders Nos. 10 and 11, by having them operate both the dough mixer and the meat slicer. (Tr. 47-49, 51, 78-79, 182, 200-01).

2(d) Records of the Required Proof of Age

Mr. Hudson testified that his spouse kept records on all minors employed and she would have supplied such information to any investigator. (Tr. 206). Mr. Curran testified that Respondent failed to maintain records of the date of births for all employed minors under the age of eighteen years. (Tr. 98). Respondent introduced no evidence to show compliance, and I give more credit to the statement of Mr. Curran that such employment records were not kept than to the statement by Mr. Hudson that such records were available on request.

2(e) Exposure to Hazards

An ALJ is not empowered with the discretion to distinguish between degrees of hazards posed in the Secretary's Hazardous Occupation Orders. *Administrator, Wage and Hour Division v. Maelou, Inc.*, 1992 CLA 43 (Sec'y April 14, 1995). The Secretary of Labor's declaration of fact is that the operation of a meat slicer is particularly hazardous for minors between the ages of sixteen and eighteen. 29 C.F.R. § 570.61(a)(4) (2002). I also note that the minors in Respondent's employ were exposed to the operating blade of meat slicer on a regular basis. Ms. Martin testified that she

spent about fifty percent of her time working in the deli with the meat slicer. (Tr. 53). Ms. Mudge testified that she worked in the deli about twenty-five percent of her time where she used the meat slicer. (Tr. 78-79). Mr. Brown testified that he used the meat slicer almost every day, (Tr. 183), and Ms. Lingenfelter testified that she used the meat slicer. (Tr. 200-01). Although Mr. Hudson had a metal meshed glove to prevent cuts, it was not regularly used by any employee. (Tr. 155). Additionally, when cutting blocks of cheese, the minors routinely removed the metal guide used to push the cheese over the slicing blade and used their hands to move the cheese over the blade. (Tr. 56). Thus, all minors were regularly exposed to the hazards of the meat slicer.

The Secretary of Labor also declared the operation of a dough mixer hazardous as a matter of fact. 29 C.F.R. § 570.62(a) (2002). Although Respondent's minor employees were not required to frequently mix dough, all four minor employees did so on a regular basis. Ms. Martin testified that she made dough two or three times per week. (Tr. 47-49). Ms. Mudge testified that she could have mixed dough as frequently as once per week. (Tr. 78). Mr. Brown testified that he could have used the dough mixer once a week, (Tr. 183), and Ms. Lingerfelter acknowledged that she used the dough mixer. (Tr. 200-01). While Respondent's dough mixer may have been more safe than "open mixers," (Tr. 71, 85, 153), the Secretary did not distinguish between types of mixers, and any use is by a minor is *de facto* hazardous.

2(f) Any Resultant Injury

The only minor employee to suffer an injury engaged in a hazardous occupation was Ms. Martin, who, on August 12, 1997, cut off 1-2 centimeters of her finger near the nail head. (RX 2, p. 1-2). Her finger was "reattached," it required eight stitches, and sixteen days later her stitches were removed. *Id*. at 4. In the days immediately following her injury, Ms. Martin returned to the hospital on a daily basis to have her finger cleaned and bandages changed. (Tr. 60). Other than the day of her accident, Ms. Martin did not miss any work. (Tr. 63). Ms. Martin's physician discharged her from treatment on October 27, 1997, (RX 2, p. 7), but by that time, Ms. Martin had missed playing basketball her junior year of high school, and she testified that prior to October, she had trouble writing. (Tr. 62-63). At the formal hearing, Ms. Martin testified that she still has decreased sensation in the tip of her finger, but she had a full range of motion. (Tr. 185-86). Mr. Curran classified the injury as "serious," (Tr. 130-31), but after listening to testimony, he doubted if he would still consider the meat slicer injury as a serious injury. (Tr. 195).

In the case of *Frazer v. Chrislin, Inc.*, 1999 CLA 5 (ALJ Dec. 17, 1999), the ALJ determined that a meat slicing cut to a minor's finger was "serious" when the minor received nine stitches, continued to experience numbness, and upon return to work, the minor resumed using the slicing machine, covering the wound with a plastic glove to make sure that it did not get wet. The injured minor was also instructed to immediately cease using the meat slicer if the health department visited the store. *Id*. at 6. The ALJ expressly stated that he found "no basis, in logic or in law, to consider the injury less than 'serious.'" *Id*. at n. 14. The ALJ also determined that a mere cut while removing a piece of meat from a meat slicer did not fall within Hazaedous Order No. 10. *Id*. at 5. Likewise in the case of *Administrator, Wage and Hour Division v. Town of Sykesville*, 2000 CLA 38 (ALJ

August 9, 2001), the ALJ determined that the minor suffered a serious injury when the index finger of the minor's hand was amputated below the first joint. The respondent conceded that the minor child received a serious injury under the FLSA. *Id*.

Neither the FLSA nor the implementing regulations define a "serious injury." "Serious injury" is not a term used in the any of the child labor statutes. 29 U.S.C. § 203(l), 211(b), 212, 213(c-d), 215, 216, 218 (2002). Rather the statute provides that "oppressive child labor" is a condition of employment that the Secretary of Labor determines is "detrimental" to the health and well being of children. 29 U.S.C. § 203(l) (2002). Thus, the purpose of the child labor regulations is to protect the health and safety of young workers, 29 C.F.R. § 570.101 (2002), and in assessing a civil money penalty the fine is determined in part by the "resultant injury." 29 C.F.R. § 570.5(c) (2002). Given the breath of the interpretative possibilities set forth in the regulations, the administrator's interpretation, if it does not conflict with the plain meaning of the FLSA, should be granted deference. *Administrator, Wage and Hour Division v. Thirsty's, Inc.*, 94 CLA 65 (ARB May 14, 1997) (slip op. at 3-4) (citing *U.S. v. Larionoff*, 431 U.S. 864, 872 (1977)).

Based on the facts of this case, Mr. Curran, the administrator, testified that after listening to the hearing testimony he was "doubtful" as to whether Ms. Martin suffered a "serious injury." (Tr. 195). The distinction between "serious" and "non-serious" was important to Mr. Curran because WH-266 instructs that higher penalties of either $8,500.00 or $10,000.00 are to be imposed if a minor receives a "serious injury" and a "bundling" theory is used to increase the fine of other minors engaged in the same task who were not injured by multiplying the fine imposed without injury by a factor of five. (PX 1, p. 1-2). I find Mr. Curran's doubts regarding the "seriousness" of the injury are rational, in accordance with the FLSA and the implementing regulations. Ms. Martin's thumb injury resulted in eight stitches, she did not miss any work, the finger had fully healed in three months, and although she suffered from a decrease in sensation, she had no loss of motion. I also note that the surrounding circumstances of this case distinguish Ms. Martin's injury from the thumb injury in *Chrislin, Inc.*, where the respondent acted more egregiously and displayed open contempt for the child labor laws. Accordingly, I find that Ms. Martin's injury was not "serious" as contemplated by WH-266 in light of the statute, regulations, Mr. Curran, and the facts of this case.

2(g) Duration of Illegal Employment

Sharee Martin's illegal employment lasted from June 1, 1997 to September 21, 1997. (ALJX 1). Amanda Mudge's illegal employment lasted from May 1, 1996 to September 22, 1997. *Id*. Bryan Brown's illegal employment lasted from February 6, 1996 to September 22, 1997. *Id*. Shonia Lingerfelter's illegal employment lasted from August 20, 1997 to September 22, 1997. *Id*.

(3) Exceptions to Imposition of Civil Money Penalties

The regulations provide that a violation of the child labor laws may be completely insulated from the imposition of a civil money penalty, or a further reduction in the penalty may be appropriate, when the evidence - "including the investigation history" and the "degree of wilfulness" - meets one of two conditions. 29 C.F.R. § 579.5(d) (2002); *Administrator, Wage & Hour Division v. City of*

Wheat Ridge, Colorado, 91 CLA 22 (Sec'y April 18, 1995) (Slip op. at 5-6) (stating that if either alternative in § 579.5(d) is met then a reduction in the penalty is appropriate); *Administrator, Wage & Hour Division v. Horizon Publishers & Distributors*, 90 CLA 29 (Sec'y May 11, 1994) (slip op. at 9) (vacating part of the ALJ's opinion assessing a civil money penalty). Unlike the provisions in § 579.5 (b) & (c), the provision in (d) are not mandatory mitigating considerations. *Administrator, Wage & Hour Division v. Supermarkets General Corp.*, 90 CLA 34 (Sec'y January 13, 1993) (Slip op. at 4).

3(a) The *De Minimis* Exception

When the "evidence shows that the violation is "*de minimis*" and that the person so charged has given credible assurance of future compliance," and when a civil penalty is not necessary under the circumstances to obtain compliance with the Act, then that evidence may mitigate in favor of imposing a lesser civil money penalty or no penalty at all. 29 C.F.R. § 579.5(d)(1) (2002). Reductions or waiver of a civil money penalty were found either appropriate or inappropriate under the following circumstances:

In *Administrator, Wage & Hour Division v. Thirsty's, Inc.*, 94 CLA 65 (ARB May 14, 1997), the ARB determined that the employer's child labor violations were not *de minimis* when the employer was cited with nearly four hundred violations, the violations ranged in the degree of severity, many children were under the age of sixteen, and some of the children were subjected to multiple violations over a period of months.

In *Administrator, Wage & Hour Division v. Navajo Manufacturing*, 92 CLA 13 (Sec'y February 21, 1996), the Secretary overturned the extent of the ALJ's application of the *de minimis* exception when: children were employed to process goods for shipment in a warehouse during school breaks; the minors parents also worked in the warehouse; no minors were injured; the employer had no history of non-compliance and cooperated with the investigation; the employer terminated the employment of the minors upon notification of the violation; and when the employer made credible assurances that it would comply with the FLSA in the future. The Secretary overturned the ALJ's determination the civil money penalty should be vacated because the dispositive factor was that the employer had involved underage children working in a warehouse in violation of a Hazardous Occupation Order, but the Secretary found it appropriate to reduce the civil money penalty by seventy-five percent.

In the case of *Administrator, Wage & Hour Division v. Horizon Publishers & Distributors*, 90 CLA 29 (Sec'y May 11, 1994), the Secretary determined that envelope stuffing by minors constituted *de minimis* violations of the child labor laws when the children had flexible schedules, and the amount of work done by each minor was minimal (17 hours per child), and when the employer gave credible assurances of future compliance - supported by its lack of a history of violations of the Act - as well as the fact that the employer immediately ended employment of the minors when its practices were brought into question by the Administrator.

In *Administrator, Wage & Hour Division v. Supermarkets General Corp.*, 90 CLA 34 (Sec'y January 13, 1993) the Secretary refused to apply the *de minimis* exception when the ALJ listed eighty-eight time and hour violations. The Secretary reasoned that seventeen of the forty-six minors employed accounted for the eighty-eight violations, which was not *de minimis*.

In this case, Respondent was cited with a total of nine violations which involved four minors. Four of the violations were for the illegal use of the dough mixer, four violations were for the illegal use of the meat slicer, and one violation was for a failure to keep required records of minor employment. I find that Respondent gave credible assurances of future compliance. For example, Mr. Hudson credibly testified that he made efforts to comply with the State of Arkansas child labor laws and he related that had he known that he was also subjected to the federal child labor laws he would have made every effort to comply with those rules.[4] (Tr. 143). As soon as Mr. Hudson learned that employing minors under the age of eighteen was illegal, he removed the meat slicer from his store, fired almost everyone under eighteen and ceased having anyone under eighteen use the dough machine. (Tr. 150-51, 181-82). Nevertheless, a minor was injured while using a meat slicer in violation of the Secretary's Hazardous Occupation Order, and I do not consider that violation sufficiently *de minimis* to completely insulate Respondent from the imposition of a civil money penalty.

3(b) Lack of Previous Violations, Unintentional Exposure & Credible Assurances

The second grounds to further reduce or eliminate a civil money penalty occurs when the evidence shows the employer had no previous history of child labor violations, the cited violations did not involve intentional or heedless exposure to an obvious hazard or health detriment, the employer gives assurances of future compliance and a penalty is unnecessary to achieve the purposes of the Act. 29 C.F.R. 579.5(d)(2) (2002). Section (d)(2) of the regulations have been applied in the following cases:

In the case of *Administrator, Wage & Hour Division v. City of Wheat Ridge, Colorado*, 91 CLA 22 (Sec'y April 18, 1995), the Secretary determined that the exception in § 579.5(d)(2) applied when a public entity employed underage pool boys in violation of a Hazardous Occupation Order. The Secretary reasoned that the city gave credible assurances of future compliance, the minor employees were never exposed to any danger, no minor child was injured, and the violations were inadvertent. The city immediately complied with the federal child labor statute and regulations upon learning of its illegal conduct. Thus, the Secretary concluded that the imposition of a civil money penalty would not further the purposes of the Act.

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[4] The Arkansas child labor laws provide that children under the age of sixteen shall not engage in hazardous occupations. (RX 6). *See* A.C.A. § 11-6-107 (2002) (providing that no child under the age of sixteen shall be employed to operate circular or band saws); AR ADC 010-14-001 § 2.301(b) (2002) (providing that children under the age of sixteen shall not operate power driven meat slicers or do any baking).

In *Administrator, Wage & Hour Division v. Chrislin, Inc*., 99 CLA 5 (ALJ December 17, 1999), the ALJ determined that § 579.5(d)(2) was not applicable when the employer intentionally exposed minor to the hazards of a meat slicer in violation of the Secretary's Hazardous Occupation Order.

In *U.S. Department of Labor v. Bludau*, 94 CLA 58 (ALJ March 12, 1996), the ALJ determined that civil money penalty was not necessary under § 579.5(d)(2) when a sixteen year old drove a fork lift and pick-up in violation of a Hazardous Occupation Order, but the job performed was not part of the minors job duties, the employer did not heedless expose the minor to the hazard, the employer was merely helping the child to earn school credit, there was no injury, no prior history of violations, and the employer assured future compliance.

In light of the regulations, the facts of the case and the jurisprudence, I do not find that the application of § 579.5(d)(2) is appropriate in this case. As discussed, *supra*, I find that Respondent creditably assured future compliance with the Act, and the evidence demonstrates that Respondent had no prior violations of the Act. Regardless of Respondent's good faith in complying with state child labor regulations, Respondent still intentionally exposed minors to the hazards of both the dough mixer and meat slicer. Three weeks after Ms. Martin cut her finger, Mr. Hudson informed ordered her to return to her duties in the deli slicing meat. (Tr. 146). Unlike *City of Wheat Ridge, Colorado*, and *Bludau*, but like *Chrislin, Inc*., this case involved the intentional (even if well intentioned) exposure of minors to occupations deemed hazardous by the Secretary of Labor, not merely inadvertent conduct. Accordingly, I find that Respondent is not entitled to a full reduction of the civil money penalty under § 579.5(d)(2).

(4) Weighing the Evidence

Accordingly, when considering the "size of the business" I find that the small "mom and pop" nature of Respondent's business, the limited number of employees, the limited amount of wages paid to the employees, and the net operating losses of the business mitigate in favor of a lesser money penalty. When considering the gravity of the child labor violations, I note that Respondent has no prior history of violating either the federal or State of Arkansas child labor provisions, and Respondent did not wilfully fail to take reasonable precautions in attempts to avoid injury to minors in its employ. While Respondent employed four minors in hazardous occupations exposing them to harm, and I find that Respondent failed to keep the proper age records, I note that the minors' exposure to the hazardous occupations was not on a continuous basis. Only one employee was injured and the resultant injury was only minor to mild. Two of the minor workers were employed for less than four months. In total, Respondent was cited with nine violations involving four different minors, but Respondent gave credible assurances of future compliance with the Act. Even though Respondent acted in reliance on the State of Arkansas child labor laws, Respondent intentionally exposed the minors to hazardous occupations and the violation of the regulations were not *de minimis* considering that a child suffered minor injuries. Based on all these factors, I find it

appropriate to reduce the Administrator's civil money penalty of $35,575.00 by seventy percent[5] to $10,672.50[6] to further the purpose of the Act.

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CLEMENT J. KENNINGTON
Administrative Law Judge

[5] Percentage deductions based on the total amount of the civil money penalty assessed by the Administrator are proper. *Administrator, Wage & Hour Division v. Navajo Manufacturing,* 92 CLA 13 (Sec'y February 21, 1996) (mitigating the Administrator's civil money penalty by seventy-five percent); *Administrator, Wage and Hour Division v. D.D. & D., Inc.*, 1990 CLA 35 (Sec'y April 3, 1995) (mitigating the Administrator's civil money penalty by forty percent).

[6] I note that this reduction fairly comports with the Administrator's testimony at trial that if Ms. Martin's injury was not deemed a "serious injury" on the WH-266, then the civil money penalty would be the same as that imposed for operation of the dough mixer, or $1,200.00 for each minor engaged in that work. As such, a total of $4,800.00 would have been assessed for the operation of the meat slicer, and an additional $4,800.00 for operation of the dough mixer, plus a $275.00 failure to keep records would have resulted in a total fine of $9,875.00 under WH-266.